LOS ANGELES BAR BULLETIN

In This Issue

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LOS ANGELES
BAR BULLETIN

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VOL. 22 SEPTEMBER, 1946 No. 1

A WORD FROM THE PRESIDENT

THE Board of Trustees has accepted an offer of Radio Station KGFJ to give radio time for a program to be produced by the Association. A committee of which Edwin W. Taylor is Chairman will produce the program for a trial period of 13 weeks which will have commenced before this issue of the BULLETIN is delivered.

The committee has arranged for programs on each Tuesday and Thursday from 5:45 to 6:00 o'clock P. M. The corresponding Monday, Wednesday and Friday periods are used by the Los Angeles County Medical Association. The station is tuned to 1230 on the radio dial.

Members of the Association are asked to listen to the programs and to state their opinions and suggestions regarding them in letters to the committee or to me. The programs are experimental and the Board will rely on the opinions expressed by members in making its decision to continue or to abandon the programs after the 13 weeks period. The Board hopes that

members will comment freely and repeatedly, whether their opinions are favorable or critical.

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The 1945 Board of Trustees appointed a committee to study the problem raised by the increased costs of clerical help, supplies, printing and other items required in the administration of the Association. The committee recommended an increase in the annual dues and in its report stated that the dues of the Association are lower than the dues charged by other metropolitan bar associations. The Board after considering the alternative of curtailing activities and after observing the effects of the restoration of income to normal by the return of members from the Armed Services, has approved the committee's recommendation.

A petition to amend the By-Laws to increase the dues of active members to $15.00 per year has been filed. The proposal will be submitted to the membership in the near future. The dues have not been increased since 1937.

Alex W. Davis

STATE BAR CONVENTION

ABOUT the time this issue of THE BULLETIN is received, the State Bar will be meeting at Coronado—its first convention since the memorable gathering at Yosemite in 1941.

In many particulars the sessions, September 24-28, promise to be of exceptional interest. The coming together of members from every part of the state, in large numbers, after five war years of tragic history, will be marked by renewals of friendships of the past days, and the making of new acquaintances among the men and women of the profession.

The business program is a very full one. Perhaps the most controversial subject will be the report of the Committee on County Courts which recommends that a single court be established in each county, by Constitutional Amendment, below the jurisdiction of the Superior Court. There are some provisions in the report that will probably develop oppositon, and a corresponding amount of oratory on both sides. Warren E.

Libby of Los Angeles is Chairman of the Committee, and on him will fall the burden of piloting the proposals through a very rough current.

The report of the Commitee on Administrative Agencies and Tribunals, Harry J. McClean of Los Angeles, Chairman, is another that is of both broad interest and great importance.

The Conference of State Bar Delegates which meets September 24, has a list of some twenty-five proposals, of a varied motive, to discuss and pass upon.

E. D. M.

BRAND NEW TRADE-MARK ACT

NEW FEDERAL LAW FOUGHT OVER FOR 8 YEARS FINALLY PASSED BY CONGRESS

By C. G. Stratton, Patent Lawyer of the Los Angeles Bar

Syllabus **(for busy Lawyers, reading time 38 sec.)**

1. *Concurrent Registration.* Same mark will be registrable for use by different parties in different parts of the country.

2. *Secondary Meaning.* A descriptive or geographic mark or a surname to be registrable if it has acquired a "secondary meaning."

3. *Incontestable.* Registrations will be incontestable after five (5) years, with certain exceptions.

4. *Notice of Claim of Ownership.* Registrations under the new Act will be constructive notice of the registrant's claim of ownership.

5. *"Service Marks," "Collective Marks"* and *"Certification Marks"* to be registrable.

6. *Assignment.* Will be able to assign mark without simultaneously assigning entire business with which it is used.

7. *Effective.* Act will go into effect July 5, 1947.

THE Lanham trade-mark bill was pending in Congress for more than eight years. It was finally passed last summer and signed by President Truman on July 5, 1946. It will become effective one year from that date.

EARLY TRADE-MARK ACT UNCONSTITUTIONAL

To understand the background of this brand new Trade-mark Act, it is necessary to go back to the Trade-Mark Act of July 8, 1870. That act provided generally for the registration of trade-marks in use or intended to be used in the United States.

Probably the most important feature of that act is that it was declared unconstitutional! The Supreme Court stated that it was invalid and unconstitutional because Congress had no power to pass such an act.[1] The Supreme Court did, however, drop a hint that such an act would seem to be constitutional if limited to commerce among the states, with foreign nations and with Indian tribes, as limited by the interstate commerce clause of the Constitution. Congress took the hint and passed the Trade-Mark Act of March 3, 1881, which remedied that defect.

The new 1946 Act itself states that it is limited to the regulation of commerce "within the control of Congress," which, in view of said Supreme Court pronouncement, is presumably limited to commerce among the several states, with foreign nations and with Indian tribes.

Therefore, the new Federal Act would seem to have nothing to do with a trade-mark used wholly within a state.

TO REGISTER MARKS CONCURRENTLY USED

One more or less violent departure from the old Trade-Mark Act (of February 20, 1905), under which business and industry have been operating for over forty years, is that beginning next July 5th identically the same trade-mark may be registered for the same type of goods when used by different parties in different parts of the country!

The courts have long recognized "territorial rights" in trade-marks.[2] That is, one concern can use a given trade-mark in one area, and an entirely different concern can use the same trade-mark for the same character of goods in a wholly different territory. The trade-mark registration laws of the United States have not heretofore recognized this. However, the new act per-

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[1]Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550.

[2]*Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 60 L. Ed. 713, and *United Drug Co. v. Rectanus Co.*, 248 U. S. 90, 98, 63 L. Ed. 141, 146.

mits concurrent registration of the same mark by two different parties, provided the parties each used the trade-mark prior to the date that either filed an application for registration of same.

TWO REGISTERS OF TRADE-MARKS

Two Registers of trade-marks are provided for under the new act. One is to be termed the "Principal Register" and the other is the "Supplemental Register." Registration in the "Principal Register" is constructive notice of the registrant's claim of ownership (a new feature in the Federal laws), but registration in the "Supplemental Register" does not imply ownership of the mark, since the following marks are registrable therein: (a) descriptive marks, (b) geographic marks, and (c) surnames.

No mark can be registered in either register (1) if it is immoral, deceptive, or scandalous; (2) if it is the flag or coat of arms of the U. S., or of any state or municipality, or of any foreign nation; (3) if it is the name, portrait or signature of any living individual, except by his written consent; or (4) if it so resembles an already registered mark as to be likely to cause confusion or mistake or to deceive purchasers.

"SECONDARY MEANINGS" OF TRADE-MARKS

The Courts have also long recognized that a trade-mark may have a "secondary meaning" that should be protected even though it is decriptive, geographic, or is a surname.[3] However, the laws of the United States have never before permitted their registration. Beginning next July the Commissioner of Patents may register such if the proof shows that the mark has been in substantially exclusive and continuous use by applicant as a mark for five (5) years next preceding the date of the application for registration.

This is quite revolutionary, in connection with registration, to an attorney familiar with the history of trade-mark acts of this country.

The "proof" that will be necessary to show this exclusive and continuous use is not clear from the act. Probably an affi-

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[3]Mr. Justice Holmes in *Coca-Cola Co. v. Koke Co.*, 254 U. S. 143, 145-6, 65 L. Ed. 189, 192; *Hopkins on Trade-Marks, Trade-Names and Unfair Competition*, 4th Ed., p. 193; and *C. A. Briggs Co. v. Nat'l Wafer Co.*, 215 Mass. 100, 103, 102 N. E. 87, 88 (Ann. Cas. 1914C 926).

davit to that effect will be sufficient for the Commissioner of Patents, for after he allows the application, the mark still has to run the gauntlet of being published in the Official Gazette of the Patent Office. Then anyone who thinks he will be damaged by such registration may oppose the registration within thirty (30) days after publication. Moreover, even after registration, anyone within five (5) years may petition to have the registration cancelled. A valid grounds for opposition or cancellation would certainly seem to be that the applicant or registrant had not used the mark substantially exclusively or continuously for the five (5) year period. These provisions would seem to be adequate safety valves to prevent anyone from obtaining a registration upon a false or erroneous affidavit.

MARK INCONTESTABLE AFTER FIVE YEARS

Another interesting and novel feature of this new act is that it renders registrations incontestable after five (5) years. This is subject to certain exceptions named hereafter. Under the present act, a mark can be cancelled at any time—ten, twenty, thirty years after the first registration. (A registration is good for twenty years and can be renewed every twenty years perpetually.)

Exceptions to this rule of incontestability after five (5) years include the following *inter alia:* The mark can be cancelled at any time (a) if it becomes the common descriptive name of an article on which the patent has expired; (b) if the mark has been abandoned; (c) if the registration had been obtained fraudulently; (d) if it contains objectionable matter outlined under (1), (2) and (3) under the heading "Two Registers of Trade-Marks," *supra;* or (e) if it were registered under the Act of March 3, 1881, or the Act of February 20, 1905, and not published under the provisions of this new act and no affidavit of five years' continuous use thereafter has been filed. Thus in due time after July 5th next, a valid ground of cancellation of any mark now Federally registered would seem to be that it has not been published under the new act.[4]

[4]This would seem to be in accordance with the provisions of Sec. 14(c) near the end thereof, although a good defense thereto would seem to be to petition forthwith for such publication under Sec. 12(c). There seems to be a little inconsistency in these sections. If a presently registered mark can be published "at any time" prior to its expiration to

To secure such incontestable benefits, however, it shall be necessary to file an affidavit within one (1) year after the expiration of such five-year period, setting forth the continuous use for such period.

Evidence of the rugged time this Bill had in Congress is shown by the many limitations by which the incontestability of trade-marks after five (5) years is circumscribed.

"SERVICE MARKS" TO BE REGISTRABLE

Heretofore trade-marks have been registrable when they related to articles of merchandise in commerce. However, several new categories of registrable marks are introduced by this new act.

First, is a new classification of "service marks." This, as the name implies, relates to the registrability of marks used in the sale or advertising of services, to identify the services of one person and distinguish them from the services of others. This provision may be availed of by advertising dentists, for instance. Moreover, this includes marks, names, symbols, titles, designations, slogans, character names, and distinctive features of radio or other advertising used in commerce.

The owners of "Hi-O Silver," "Superman," and the "Blue Beetle," may scream at their juvenile listeners that these are registered "service marks," come next July.

The sole limitation to this type of registration is that this character of mark must not be used to represent falsely that the owner makes or sells the goods on which such mark is used.

"COLLECTIVE MARK" IS NEW CLASSIFICATION

The Los Angeles Bar Association could take advantage of this provision for itself. "Collective marks," which will also be registrable, include any trade-mark or service mark that is used jointly or severally by the members of a cooperative, an association or other collective group or organization, including a union.

The limitation of this type of mark is that, for it to be registrable, it must not be used so as to represent falsely that the owner or a user thereof makes or sells the goods or per-

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secure registration under the new Act, query: Could it be so published and registered after cancellation under Sec. 14(c)?

forms the services on or in connection with which such mark is used.

"CERTIFICATION MARKS" ANOTHER NEW GROUP

A third new group of marks that are registrable are so-called "Certification Marks." This type of mark certifies regional or other origin, material, mode of manufacture, quality, accuracy or other characteristics of certain goods or services, or that the work or labor on the goods or services was performed by members of a union or other organization.

This variety of mark would appear to include "California" for oranges, "Hollywood" for play clothes and movies (Hollywood Chamber of Commerce please note), "Los Angeles" for furniture, airplanes, oil well supplies, etc., etc.,

A certification mark is used for products or services of one or more persons other than the owner of the mark.

However, such registrations must be by the person, state, municipality or nation which exercises "legitimate control" over

the use of the marks sought to be registered. Thus the Mayor, on behalf of the City of Los Angeles, might register the name of the City or "Hollywood" so that so-called "Los Angeles" and "Hollywood" goods would not originate in New York. Unlike ordinary trade-marks, to register a certification mark, the applicant need not possess an industrial or commercial establishment.

RELATED COMPANIES MAY USE TRADE-MARK

A practice has grown up of one concern licensing others to use a trade-mark. This is done in the bakery industry, for instance, for bread. The propriety of this custom has been questioned, since a theory of a trade-mark is that it should denote a single origin. This custom is to have official recognition, beginning next July, for this new act states that such use shall inure to the benefit of a trade-mark registrant, and such use shall not affect the validity of such mark or of its registration. There is a proviso, however, that the mark must not be used in such manner as to deceive the public.

This is officially termed "use by related companies." A "related company" includes any person, firm or corporation which legitimately controls the nature and quality of the goods or services in connection with which the mark is used. The registrant may control the related company, or the related company may control the registrant.

ASSIGNMENT LAW ALSO CHANGED

A stumbling block is often encountered in trying to assign a trade-mark, since a trade-mark cannot be assigned without a concurrent assignment of the entire business with which it is connected.

To remedy this rather harsh rule, this new Act will permit the assignment of a trade-mark with only that part of the goodwill of the business connected with such mark and it will not be necessary to include the goodwill connected with the use of any other mark used in the business or by the name or style under which the business is conducted.

One feature of the recording of a trade-mark assignment not experienced in state practice is that an assignment of a trade-mark is good as against even a subsequent *bona fide* purchaser for value, if the assignment is recorded within three (3) months from its date.

Thus in checking the assignment records with regard to any trade-mark (or patent), one can never be sure that there is no outstanding assignment, for there might be a valid one less than three (3) months old.

NO ATTEMPT TO BE EXHAUSTIVE

Although the patient reader, who has read to here, may seriously and with some basis, doubt it, no attempt has been made in this article to be exhaustive as to the terms of the Trade-Mark Act that goes into effect next July. At the most, this summary only covers what appears to the author to be highlights of the 1946 Trade-Mark Act, together with a few remarks concerning features of the present and past laws.

PROPOSED CALIFORNIA FAIR EMPLOYMENT PRACTICES ACT

INITIATIVE MEASURE (No. 11) TO BE VOTED ON IN NOVEMBER ELECTION

Bar Bulletin Committee Invites Written Arguments on Proposed Law

Many attorneys have expressed an interest, either pro or con, with regard to the proposed California State Fair Employment Practices Act. This measure, designated as No. 11 on the ballot for the November 5th general election, is printed in full following this announcement. The editors of the Bulletin invite brief written arguments, either for or against the Act, from members of the Bar. Manuscripts should be not longer than 750 words and should be submitted to the Bar Bulletin Committee, 1124 Rowan Building, Los Angeles 13. All written material submitted shall become the property of the Los Angeles Bar Bulletin, and the editors reserve the right to select and print in the next issue of the Bulletin written arguments on both sides of the question.

The text of the proposed California Fair Employment Practices Act is as follows:

The people of the State of California do enact as follows:

Section 1. This act may be referred to as the "California Fair Employment Practice Act."

Sec. 2. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life, and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness. The opportunity to obtain and hold employment without discrimination because of race, religion, color, national origin or ancestry is hereby recognized and declared to be such a civil and constitutional right.

Sec. 3. The people of the State of California declare that existing practices of discrimination involving race, religion, color, national origin or ancestry are a matter of State concern because they

(1) Foment strife and unrest;

(2) Threaten the rights and privileges of all of us;

(3) Affect substantially and adversely the interests of employees, and employers, thus depriving the State of the fullest utilization of its capacities for development and advance;

(4) Menace the institutions, foundations and traditions of our free democratic state and society;

This act shall be deemed an exercise of the police power of the State for the protection of the public welfare, prosperity, health and peace of the people of the State of California. The people declare that the protection and safeguarding of the right and opportunity to obtain and hold employment without such discrimination or abridgement shall be public policy of this State.

Sec. 4. There is hereby created a State Fair Employment Practice Commission. Such commission shall consist of five members, to be known as commissioners, who shall be appointed by the Governor. The commissioners shall elect one of their number chairman of the commission. The term of office of each member of the commission shall be for four years, provided however, that of the commissioners first appointed two shall be appointed for a term of one year, one for a term of two years, one for a term of three years, and one for a term of four years.

Any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the unexpired term of the member whom he is to succeed. Three members of the commission shall constitute a quorum for the purpose of conducting the business thereof.

Sec. 5. The members of the commission shall not practice their respective professions or callings, but shall devote their entire time to the duties of their respective offices. Each member of the commission shall receive a salary of seven thousand five hundred dollars ($7,500) a year and shall also be entitled to his expenses actually and necessarily incurred by him in the performance of his duties.

Any member of the commission may be removed by the Governor for inefficiency, neglect of duty, or misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon.

Sec. 6. The commission shall have the following functions, powers and duties:

1. To establish and maintain a principal office and such other offices within the State as it may deem necessary.

2. To meet and function at any place within the State.

3. To appoint such attorneys, clerks and other employees as it may deem necessary and prescribe their duties.

4. To obtain upon request and utilize the services of all governmental departments aid agencies.

5. To adopt, promulgate, amend and rescind appropriate rules and regulations to carry out the provisions of this act.

6. To receive, investigate, act in and render decisions on alleged instances of discrimination in employment because of race, religion, color, national origin or ancestry.

7. To hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the commission.

No person shall be excused from attending and testifying or from producing records, correspondence, documents or other evidence in obedience to the subpoena of the commission, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The immunity herein provided shall extend only to natural persons so compelled to testify.

8. To create such advisory agencies and conciliation councils, local or otherwise, as in its judgment will aid in effectuating the purposes of this act, and may empower them to study the problem of discrimination in all or specific fields of human relationships or in specific instances of discrimination because of race, religion, color, national origin, or ancestry, and to foster through community effort or otherwise good will, cooperation and conciliation among the groups and elements of the population of the State, and to make recommendations to the commission for the development of policies and procedures in general and in specific instances. Such advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay, but the commission may make provisions for technical and clerical assistance to them.

9. To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of race, religion, color, national origin or ancestry.

10. To render annually to the Governor and biennially to the Legislature a written report of its activities and its recommendations.

Sec. 7. It shall be an unlawful employment practice:

1. For an employer acting for himself, or acting through any other person, or acting through any employee who at the time is acting within the course and scope of his employment, to refuse to hire or employ, or to bar, or to discharge from employment any person because of the race, religion, color, national origin or ancestry of such person, or for an employment agency to refuse or fail to refer any person for employment, because of the race, religion, color, national origin or ancestry of such person, or for any of them to discriminate against such person in compensation or in terms, conditions or privileges of employment. This section shall be interpreted so as to guarantee and protect all the rights of veterans of the United States military services under all Federal and State legislation protecting the rights of such veterans to employment.

2. For a labor organization to exclude, expel or restrict from its membership or fail or refuse to refer to employment any person because of the race, religion, color, national origin or ancestry of such person,

or to discriminate in any way against any of its members, or against any employer, or against any person employed by an employer, because of the race, religion, color, national origin or ancestry of such member, employer, or employee, or to provide only auxiliary, second class or segregated membership for any person because of the race, religion, color, national origin or ancestry of such person.

3. For any persons included within the scope of this act to make any inquiry in writing or orally in connection with an application for employment or in connection with prospective employment, or in connection with membership in any labor union, as to the race, religion, color, national origin or ancestry of the applicant, employee or employer, or to make any inquiry which expresses directly or indirectly any limitation, specification or discrimination as to race, religion, color, national origin or ancestry, or any intent to make any such limitation, specification or discrimination.

Questions concerning race, religion, color, national origin or ancestry, based upon a *bona fide* occupational qualification, may be asked upon specific written approval in advance by the commission.

4. For any persons included within the scope of this act to discharge, expel or to discriminate in any manner against any person because he has opposed any practice forbidden under this act, or because he has filed a complaint, testified or assisted in any proceeding under this act.

5. For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.

Sec. 8. Every contract to which the State or any of its political or civil subdivisions is a party shall contain a provision requiring the contracting parties and their agents or assignees not to commit or permit any unfair employment practice, as defined in Section 7.

Sec. 9. The commission is empowered to prevent unfair employment practices. It may act upon a written complaint or as a result of its own investigation wherever it shall appear to it that an unfair employment practice has been committed. After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission staff, prompt investigation in connection therewith. If the commissioner shall determine after such investigation that an unfair employment practice has been committed, he shall immediately endeavor to eliminate such unlawful employment practice by conciliation and persuasion.

Where, as a result of the commission's own investigation, it shall appear to it that an unfair employment practice has been committed, the chairman of the commission shall immediately appoint a commissioner to endeavor to eliminate such unlawful employment practice by conciliation and persuasion.

In case of the commissioner's failure to eliminate such practice, or in advance thereof, if in the judgment of the commission or commissioner circumstances so warrant, the commission after reasonable notice shall hold a hearing at a time and place specified in such notice. The commission shall have full authority to hear the evidence and render a decision thereon, except that the commissioner who shall have previously made the investigation or attempted conciliation and persuasion shall not participate in any deliberations of the commission in such case, and shall participate in the hearing only as a witness. Admission made during conciliation shall not be received in evidence.

All hearings and investigations before the commission or a commissioner are governed by this act and by the rules of practice and procedure adopted by the commission. In the conduct thereof, the commission or commissioner shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calcu-

lated to ascertain the truth of the matter in issue and carry out justly the spirit and provisions of this part. The case in support of the complaint, or of the commission's investigation, shall be presented before the commission or commissioner by one of its attorneys or agents. The testimony taken at the hearing shall be under oath and be transcribed. If, upon all the evidence at the hearing, the commission shall find that any unlawful employment practice as defined in this act has existed, exists, or is threatened, the commission shall state its findings and shall issue and cause to be served upon the person committing such unlawful employment practice, or threatened practice, an order requiring such person to cease and desist from such unlawful employment practice, or threat thereof, and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, or acceptance into or restoration of membership in any respondent labor organization, as in the judgment of the commission or commissioner will effectuate the purposes of this act, and including a requirement for report or periodic reports of the manner of compliance. If, upon all of the evidence, the commission shall find that an unlawful employment practice has not been committed or threatened, the commission shall state its findings and shall issue an order dismissing the complaint or investigation. Any complaint filed pursuant to this section must be filed within six (6) months after the alleged unfair employment practice. Upon the written agreement of the party against whom the order will run, a consent order may be entered by the commission without a hearing.

Sec. 10. Judicial review of final orders of the commission shall be available to any party against whom the order runs, provided he shall petition for such review in the appropriate court within twenty (20) days after the entry of order. The form of the review shall be certiorari. Such proceedings shall be brought in the District Court of Appeal of the State of California, in the district wherein the unlawful employment practice which is the subject of the commission's order occurred. The commission's findings as to venue shall be conclusive.

A copy of the petition must be served on the commission prior to the filing thereof. The commission must furnish to the district court wherein the petition for review has been filed a copy of the transcript, together with a copy of the commission's order from which the appeal has been taken, within twenty (20) days after the petition is filed. Failure to petition for review shall be conclusively presumed to constitute consent to the commission's order.

At any time after the rendition of its decision the commission may obtain a court order enforcing its order. Violation of an order of the commission after such order shall have been finally sustained upon appeal, shall constitute contempt of court. No objection that has not been urged before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The court must enforce the commission's order unless it is contrary to law or unsupported by the evidence. If the court shall find that the commission's order would be enforceable if modified, the court must make the appropriate modification and enforce the order as modified.

All proceedings shall be heard and determined by the court as expeditiously as possible and with lawful precedence over other matters. Any court passing on orders of the commission must render a final decision within five (5) months after such petition is filed in such court, and judges of such court shall be required to make affidavit that they have complied with this requirement as a prerequisite to the payment of their salaries.

The court shall have the power to grant appropriate relief to the commission while the review is pending. The filing of a petition for

review shall not operate as a stay of the commission's order. No court of this State shall have jurisdiction to issue any restraining order, or preliminary or permanent injunction, or any other restraint preventing the commission from performing any of its functions. Nor shall any court have jurisdiction to make any order affecting the commission or its orders, except as specifically provided in this act.

Sec. 11. 1. The term "person" includes one or more individuals, partnerships, associations, or corporations, legal representatives, trustees in bankruptcy, receivers, the State or any political or civil subdivision thereof, and cities.

2. The term "employment agency" includes any person undertaking to procure employees or opportunities to work.

3. The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

4. The term "employer" includes the State or any political or civil subdivision thereof and cities, but does not include any person regularly employing fewer than five (5) persons, nor association or corporations organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, nor clubs organized and operated exclusively for pleasure, recreation and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

5. Coverage does not include any individual employed by his parents, spouse or child or in the domestic service of any person in the home of such person.

6. The term "commission" means the State Fair Employment Practice Commission created by this act.

Sec. 12. Any person who shall wilfully resist, prevent, impede, or interfere with the commission or any of its members or representatives in the performance of duty under this act, or shall wilfully violate an order of the commission, shall be guilty of a misdemeanor and be punishable by imprisonment in a county jail for not more than six (6) months, or by fine of not more than five hundred dollars ($500) or by both; but procedure for the review of the order shall not be deemed to be such wilful conduct.

Sec. 13. The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this act shall be deemed to repeal any of the provisions of the civil rights law or any other law of this State.

Sec. 14. If any clause, sentence, paragraph, or part of this act or the application thereof to any person or circumstances, shall for any reason be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act and the application thereof to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstance involved.

Sec. 15. To carry out the provisions of this act there is hereby appropriated out of any money in the State treasury the sum of two hundred fifty thousand dollars ($250,000) or so much thereof as may be necessary continuously for each fiscal year commencing with the Ninety-eighth (98th) Fiscal Year, subject to the provisions of Section 16304 and Section 13320 to 13324 of the Government Code.

The appropriation made by this section shall be available for expenditure in addition to any other moneys appropriated to carry out the provisions of this act.

THE PROBLEM OF UNAUTHORIZED PRACTICE

By Ewell D. Moore, Member of the Bar Bulletin Committee

TEXT—Sec. 6125, Business & Professions Code:
"No person shall practice law in this state unless he is an active member of the State Bar."

IT MAY be too soon to venture an optimistic opinion, but there are hopeful signs here and there that the Bar is becoming conscious of the threat of growing unauthorized practice of law by unlicensed individuals. We have indulged the hope for action on this front many times in the past only to be disappointed. Perhaps the organized Bar has at last come to recognize the full import of the inroads lay practitioners have been permitted to make in a field we have naively regarded as exclusive. The subject is controversial, of course; but lawyers are presumed to like discussions.

Let it be made clear that what may be said here is one man's opinion, and is directed against unlicensed individuals who are obviously, and often knowingly, violating laws designed to regulate lawful practice. Singly, their acts may seem quite unimportant; but in the aggregate the volume of unauthorized practice is very large.

INCREASE IN PRACTICE BY LAYMEN

Whenever general business is good, as at the present time, there is an increase in the number of persons engaged in the unauthorized practice of law. In such periods it might reasonably be expected that attorneys would enjoy increased law business, but it does not appear to be working out that way.

The great volume of business transactions in the confused process of reconversion after war, has created opportunities and temptations for unlicensed persons who assume to be competent to draw legal documents; give legal advice in matters affecting property rights, labor relations, estate planning, taxes, and to practice before state governmental agencies, commissions and boards—to mention only a few. They have been quick to take advantage of the opportunities, to their very considerable profit. Too late, in many instances, innocent victims who hire such

services find themselves involved in an aftermath of expensive litigation.

Of course, there are many persons who will "take a chance" on this kind of service by laymen for the sake of quick action, or to save legal fees; others will say that lawyers are too slow and too technical when necessity demands prompt decision. As one business man said to a lawyer who called attention to the dangers inherent in such circumstances: "So what! If litigation results, and the chances are it will not, why, you fellows will then get yours in court actions that may become necessary to get these guys out of the mess. Besides, they can always submit the dispute to arbitration at small cost and get quicker action."

Now, that is not constructive thinking, of course, but it does illustrate the attitude of an increasing number of persons toward lawyers, and their rightful insistence that the public be protected against unreliable and sometimes outright pernicious advice by laymen on strictly legal matters. One can always hear the same defensive argument from such persons, namely, "You

guys who profess to be so smart and ethical simply want to cut us out and grab everything for yourselves. It's not the public you are thinking about."

Well, we are not claiming absolute purity. We have rotten apples and bad eggs amongst us, as has every other professional group; but on the whole members of the legal profession are well up on any list of honest men and women. And the decent ones *do* try to save the public from being misled into thinking that a smart layman can draw as good a contract or will as can a smart lawyer.

The greatest number of laymen carrying on unauthorized practice are to be found among real estate brokers and agents; notaries public, uncertified accountants; estate planners, and labor counselors. Perhaps some of the services rendered by these persons are harmless and proper; but too often property rights are involved in such transactions to the ultimate detriment of the individuals served.

WHAT THE A. B. A. COMMITTEE IS DOING ABOUT THE PROBLEM

It is to be noted that law book publishers apparently are conscious of the extent of the use of law books by laymen, and advertise books containing digests of business laws quite extensively. The American Bar Association's Committee on Unauthorized Practice of Law has on the list of subjects for discussions at its meeting to be held in Dallas, Texas, in the near future: "The Advertisements of Publishers Distributing Legal Books Among Lay Persons." Of course, one may publish and sell any book one pleases, so long as it does not violate good morals; and the lay public may buy all the law books it wants. But it will be interesting to learn what the A. B. A. Committee has to say on the subject.

Other problems the Committee has on its agenda are: "The right of lay persons to practice before administrative tribunals"; "The scope of permissible activities of accountants employed by a law firm and of a lawyer employed by an accounting firm." Discussion of these subjects should bring out opinions of interest to the entire bar membership. The Committee will also discuss: "The propriety of counsel for a trade association rendering legal opinions to individual members of the association," and finally,

"The permissible activities of life underwriters, including estate planners and pension trust experts."

Now, we have no detailed information on the extent of such lay activities, if any; but the mere fact that the A. B. A. Committee includes them in its agenda seems to imply that they are important enough to warrant its investigation. It is possible, of course, that the discussions are merely exploratory, with the view of arresting any tendency to perform acts that would constitute unauthorized practice. If so, their foresight is commendable.

REPORT OF OUR OWN STATE BAR'S COMMITTEE ON LAYMEN'S ACTIVITIES

In states having integrated bars, like California, for example, there seems to be less unauthorized practice than in states having only voluntary associations. But in spite of the ability of the former to proceed more effectively against offending persons, the practice persists to a considerable extent. In California the State Bar has long been alert to the evil and has been reasonably successful in arresting its growth.

The California State Bar's "Committee on Laymen's Activities," in its annual report finds that in its considered opinion, "as a result of many months of intensive work by the committee's investigator and due consideration of his reports," that, "the evils of lay practice are greatly exaggerated in the minds of those members of the legal profession not conversant with the facts." and it further finds, "that the problem of lay practice before such agencies (administrative) is not acute."

Perhaps I should stop right here and humbly inquire: "Who am I to question the findings of a committee composed of many distinguished and able members of the California bar, who have had the benefit of an investigator's services?" I *do* question my temerity; but I feel impelled to express my mild disagreement.

The Committee's report concedes, however, that: "The number of legal instruments drafted by laymen is, of course, enormous. Your Committee merely has attempted to consider this problem in the terms of what limitations exist on legal activities of laymen."

It had the same difficulty that faces everyone who attempts to lay down a slide rule measurement by which the activities

of laymen with relation to unauthorized practice of law, may be legally determined, and when they constitute a disservice to the public. The committee is convinced, however, that two courses of procedure should be undertaken, namely: "The formation of pacts or working agreements with certain professions," and "Amplification of the present practice of disseminating information of what does constitute unlawful practice by laymen."

Perhaps it is unfair to quote and discuss only a few brief sentences and to pass over other fine points and recommendations contained in the Committee's report. I do not wish to appear unfair, but I wish to make a point on each of the sentences quoted, namely: that there is a great deal of drafting of legal documents by laymen, and that pacts with certain professions and the dissemination of information on what constitutes unlawful practice should be followed.

The making of pacts or working agreements with certain organizations and groups, so far as it has proceeded, has undoubtedly materially reduced lay practice of law; especially where banks and trust companies are concerned. It is to be

noted with satisfaction that many banks, especially in California, are now calling attention in their advertisements to the value of a lawyers services in the making of wills, and in other matters affecting property rights. This, of course, represents progress toward our goal. It is practical recognition of the fact that the lawyer as such, is an important factor in our economic life.

But as to the statement that dissemination of information designed to inform the individual of what constitutes unlawful practice will tend to minimize it, I do not entirely agree. It has been carried on, more or less consistently, in various states with doubtful results. Unfortunately, very little of such information will reach the individual offender; even if it does, it will not, in my opinion, induce him to desist.

ACTIVITIES IN OTHER STATES AGAINST UNAUTHORIZED PRACTICE

From time to time the American Bar Association's Committee on Unauthorized Practice, distributes news from various states, reciting the activities of bar associations in their endeavors to solve the problem of unlawful practice of law by individuals, and sometimes by business organizations. Let us consider a few of the latest of such reports:

a. Texas

The Texas Bar Association's Public Relations Committee says in its annual report:

"The practice of law has been so encroached upon that the layman, when he has a problem does not think of the lawyer. Corporations and individuals who are not lawyers conduct extensive advertising programs inviting the public to come and consult with them regarding various problems." The committee then recommends that the State Bar of Texas conduct an educational program, in its name, for the purpose of informing the public on the functions of the lawyers; to promote an understanding of the State Bar; on the importance of consulting a lawyer first to prevent becoming involved in difficulties, and so on.

Not all local bar associations have lacked the courage to proceed in a forthright manner. For example, the Comal County (Texas) Association adopted the unique method of buying newspaper space and advertising to the public that unauthorized practice of law is conducted in the county, and urging appropriate action by public officials. The association's resolution, printed in

full, recited that the law and court decisions of Texas limits the practice of law to duly licensed attorneys; that grave doubt is cast upon the validity of many legal instruments and documents, such as wills, deeds, notes, mortgages, etc., which have been drawn by persons not licensed to practice law; that a number of persons have been and are presently illegally engaged in that county in preparing such papers. It requests the county attorney to bring the necessary suits for injunction against those offending against such laws, and tenders the services of members of the bar association in prosecuting such suits.

b. Michigan

The Michigan State Bar Committee considering the same problem, recommended in its annual report, that when court action is proposed in any court of the state, the committee shall be authorized to institute action in the name of the local association, or individual lawyers of the community, and that a member of the committee act as counsel. It calls attention to the fact that because of personal acquaintance between members of the bar and the lay public, in some communities it is difficult for the local bar association to find in its midst counsel who may take an objective attitude toward pending violations. We suspect that this same hesitancy on the part of lawyers in small communities to complain of lay practice, exists throughout the country. It is both a natural and an understandable hesitancy.

c. Wisconsin

In Wisconsin, the Unauthorized Practice Committee reported to the State Bar Association that: "This has been one of the most active years in the history of our committee so far as volume of work is concerned. Apparently unauthorized practice of law has been on the increase in Wisconsin during the war years. * * * Almost universally it has been the feeling of local bar associations that the offenders should be warned rather than prosecuted, and we have been very successful in obtaining immediate written assurances of discontinuance of illegal practice."

d. Nebraska

In Nebraska the State Bar's Committee on Unauthorized Practice recommended that proceedings be promptly instituted against the American Arbitration Association by information and complaint; that it be brought before the Supreme Court of Nebraska to show cause why it should not be adjudged guilty

of contempt of court; that the attorney general and the county attorney of Douglass County cooperate before the court, and that the information be promptly filed with the prosecuting officials, signed by one or more members of the Committee, or by a judge of any state court.

e. Missouri

The Butler County (Mo.) Bar Association published twice in a local paper an advertisement captioned: "Notice to Unauthorized Persons Practicing Law," which reads, in part, that: "There are a number of persons, firms and corporations who are not licensed attorneys, who are and have been for some time unlawfully engaged in the practice of law * * * by advertising and counseling persons, firms and corporations as to secular law, and drawing deeds, wills, mortgages and other papers and instruments relating to their rights under the law. You are hereby notified that persons engaged in such unlawful acts are subject to fines and penalties, under the state law and will be prosecuted."

f. Ohio

Let us consider for a moment what one of the largest and most militant bar associations in America—the Cuyahoga County Association, which includes Cleveland, Ohio, has done to curb illegal practice by just one group of laymen, Notaries Public.

The association procured, five years ago, a Rule of Court, creating the Notary Examination Committee. All persons desiring a notary public commission must file an application with the Chief Justice and pay a fee of $5.00. The application is reviewed by the committee, and a set of written questions is given the applicant. When the questions are answered, the application and the answers are reviewed in the presence of the applicant by a committee of two lawyers, to determine the general qualifications of the applicant. If the committee is satisfied, they approve the application after which the bond is filed and approved by one of the judges of the court. Since this committee has functioned, the number of notaries public in the county has been reduced from 12,000 to about 7500. The committee states it discovered cases where persons acting as notaries were minors; it also found other cases where notaries could not read or write English, some who had criminal records, and a few who were not even citizens of the United States.

When one stops to consider that the American people in small communities are inherently conservative and tolerant, and that lawyers generally are among the ultra conservatives everywhere, the actions of these bar groups appear almost revolutionary in the professional history of the practice of law. Therefore, it is surprising that the full significance of these happenings has not commanded more attention and comment among those who are presumed to observe and analyze trends of economic changes in our way of life. We must admit that the activities of the organized bar generally, do not receive much attention by newspapers.

The means these local bar groups have used or are advocating for use, in order to minimize or eradicate unlawful practice, is admirably suited to their own circumstances. It is direct action, and is likely to be more effective than all the public relations programs that could be devised for that purpose, or to "educate" the public on the functions of lawyers in the economy of their own communities.

CONCLUSION

If there are existing laws in any state that limit the practice of law to licensed attorneys, and there is good evidence that such laws are being violated to the detriment of the public, then it is the duty of the bar not only to call public attention to such violations, but to do something to enforce the laws to prevent them.

There is, of course, the element of personal interest involved in every such action. And why not? Is the profession of the law the only one restrained from protecting its valuable right to practice law honestly for fear of shocking the ethical sensibilities of some of its members, or, perhaps, a small and shrinking minority of the public? Let us be realistic about it. The ethical point of view is sometimes based upon whether one is a little or a big individual in his own group.

Whenever the unlawful practice problem becomes acute in a community it appears that the bar is inclined to attack it by means of a public relations program designed to "educate" the public on the dangers of engaging laymen to perform legal services; in other words, to create public opinion against the evil. Such campaigns are educational but indirect; that is, they at-

tempt to stress the functions of the lawyer, and to promote an understanding of such functions.

Now, public relations programs are effective in many circumstances; either to build favorable opinion where little or none presently exists, or to overcome public prejudice which has been permitted to grow up—sometimes mistakenly so—against certain practices or situations. It is widely regarded as the sovereign remedy. But we know, and the public knows, that such "educational" programs may be used, and often are used, to accomplish purposes neither unselfish nor commendable.

As applied to the problem under discussion, I have come to the conclusion, in direct opposition to previous convictions, that campaigns to "educate" the public to the desirability of prohibiting practice of law by laymen, have not been successful, nor are they likely to accomplish much hereafter. The practice is largely the result of fundamental changes in our industrial, economic and social life. The Bar is not entirely blameless in ignoring, to a large extent, its relationship to changed conditions. It has held tenaciously to its traditions—regarding tradition and professional monopoly as everlasting; it has tried to compete by using machinery sometimes outmoded. Our professional tradition is an intangible thing and may be grasped only in our ponderous libraries of law books.

If there are existing laws that prohibit the practice of the law by unlicensed persons, let them be enforced. If there are no such laws, let the profession try to have them enacted.

BOOK REVIEW

Labor Unions and Municipal Employee Law. By CHARLES S. RHYNE. National Institute of Municipal Law Officers, 730 Jackson Place, N.W., Washington 6, D. C., 1946. 583pp.

Since the cessation of actual hostilities with Germany and Japan, Labor has been letting off the accumulated steam of the war years by a seemingly endless series of strikes, organizing campaigns and crises of various sorts. Organizational activities have expanded from the field of employees of private industry, through public utilities, until now concerted campaigns are being conducted by the A.F. of L. and C.I.O. to organize public employees. Stated in another way, public employees means

employees of the public, of you and me; it means our policemen, our firemen and the host of other governmental employees whose activities do not so directly touch our lives.

From this standpoint, the volume is timely indeed. Quite apart from the philosophical viewpoint of whether public employees should be permitted to affiliate with national or international unions, to enter into collective bargaining contracts or to strike, definite legal problems are presented. Can such activities and contracts be compatible with the Civil Service Laws? Can the State or its subdivisions enter into a closed shop contract agreeing to employ only members of a particular union? Is there an illegal delegation of public power to a private group by the law-making body in entering into a contract with a labor union covering terms and conditions of employment? These and incidental questions are the subject of this work.

Designed primarily as a guide to municipal law officers, the work compiles the experience in this field from the Boston Police strike in 1919 to the Houston City Employes' strike in 1946. Fundamentally it is a compilation of the text of court decisions,

state statutes and the opinions of attorney generals and city attorneys as reflected from a survey of over 400 cities, only 135 pages being devoted to text.

Though they may be subject to considerable challenge, the author states his conclusions succinctly, pp. 150-152. In his opinion, municipal employees may organize, but they may not achieve collective bargaining contracts covering wages or other conditions of their employment, a closed shop, maintenance of membership, the check-off, arbitration of disputes, nor may they strike or picket. If he is correct in these conclusions, the conceded right to organize seems an empty one.

It is to be expected that developments in this field will rapidly out-mode much of the background material upon which the author bases his conclusions. For example, the opinion of Los Angeles Superior Court Judge Henry M. Willis in the case of *Nutter v. City of Santa Monica,* which is reprinted in the appendix, has already been superseded by the decision of the District Court of Appeal (Nutter v. City of Santa Monica, 74 A. C. A. 331, April 30, 1946) holding that even if California Labor Code Section 923 would authorize a court to compel an employer to bargain collectively with his employees, such section does not apply to the state or its political subdivisions either as to governmental or proprietary functions.

GEORGE R. RICHTER, JR.

FROM THE PAST

Quotations and Notes from Early Numbers of the Bar Bulletin

At the meeting of the Association held on June 24, James S. Bennett read an able paper on the analysis of the recent decision of the supreme court on no par value stock. Edmund B. Drake, who has long been known as a specialist in personal injury litigation, read a paper on the subject of the psychology of juries. It was necessary for President Overton to call the meeting to order to stop the applauding after Mr. Drake concluded.—June, 1926.

* * * *

Eugene Overton, President of the Association, delivered an address before the meeting of the Judicial Section of the California Bar Association, on June 19 at the Alexandria Hotel, on "Responsibility of the Bar to the Public in the Selection of Judges."—July, 1926.

OPINIONS OF THE COMMITTEE ON LEGAL ETHICS

OPINION NO. 161
July 2, 1946.

Attorney—Veteran—Advertising in newspaper of resumption of practice of law—(Rule 2a, Rules of Professional Conduct, State Bar of California).

Rule 2a of the Rules of Professional Conduct cannot reasonably be construed to permit a veteran attorney, who before entering service in the armed forces, had practiced in another state and had not become a member of the California Bar until after his discharge, to advertise in newspapers that he has "resumed" the practice of the law in California.

The Committee is asked for its opinion on the following question:

An attorney practiced law in another state from 1939 to 1942 and was not a member of the State Bar of California. He entered service with the armed forces in 1942 and was discharged in January, 1946. He expects to be admitted to practice in California in June, 1946 and plans on opening his own office in this state immediately following his admission. The question presented is whether he may, under Rule 2a of the Rules of Professional Conduct of the State Bar, announce by advertising in newspapers that he has "resumed" the practice of law.

The Committee is of the opinion that he may not.

The portion of Rule 2a with which we are concerned reads as follows:

> "Notwithstanding the provisions of Rule 2, it shall be permissible for any veteran who is a member of the State Bar, at any time within ninety days after he resumes practice of law, or within ninety days after the effective date of this rule, whichever date is later, to announce by advertising in newspapers, magazines or journals, the fact that he has resumed the practice of law, the location of his office, his telephone number and any other matters permitted by Rule 2. Such announcement must be in simple dignified language and appearance. The total publications of such announcement shall not exceed seven."

It seems obvious that the purpose of this rule is to give a veteran, who had built up a clientele and a reputation in California before leaving his practice to enter the armed services, an opportunity in a relatively inexpensive manner, to notify friends, fellow lawyers and former clients that he has returned to his practice, without being required to mail a separate card to each person to whom he wishes to give notice. We believe that the words "veteran who is a member of the State Bar," reasonably construed, mean a veteran who was a member of the State Bar at the time he entered service in the armed forces. The reference in Rule 2a to "any other matters permitted by Rule 2" strongly suggests that Rule 2a was designed to supplement the privileges given "service members" as defined in Rule 2. "Service members" under Rule 2, means persons who were members of the State Bar when they joined the armed forces.

We believe Rule 2a cannot fairly be interpreted to cover the case of a veteran who had never practiced in California and who therefore did not leave a local practice and clientele to be attended to by other lawyers while he was serving with the armed forces. The proponent of the question before the Committee is opening a new office and starting a new practice, and we believe he is subject to the limitations of Rule 2 with respect to solicitation of professional employment by advertising. While in a literal sense he is resuming the practice of the law, he is not resuming his former practice, but starting a new one, and we think he may not with propriety announce that fact by advertising in newspapers.

This opinion, like all opinions of this Committee, is advisory only. (By-laws, Art. VIII, Sec. 3.)

COMMITTEE ON LEGAL ETHICS.